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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

8 MARIO LOPES BENITEZ,

*Petitioner,*

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12 || E.K. McDANIEL, *et al.*,

### *Respondents.*

3:08-cv-00543-ECR-VPC

## ORDER

15        This habeas matter under 28 U.S.C. § 2254 is before the Court for consideration of an  
16 exhaustion defense raised in the answer as to Ground 2, which was permitted by the most  
17 recent scheduling order in the case. The exhaustion defense necessarily must be addressed  
18 prior to disposition of the merits on the remaining claims.

## ***Background***

Petitioner Mario Lopes Benitez seeks to set aside his December 2001 Nevada judgment of conviction, pursuant to a jury verdict, of sexual assault of a minor under the age of fourteen. Petitioner challenged his conviction both on direct appeal and state post-conviction review.

## **Governing Law**

Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust state court remedies on a claim before presenting that claim to the federal courts. To satisfy this exhaustion requirement, the claim must have been fairly presented to the state courts completely through to the highest court available, in this case the Supreme Court of Nevada.

1    *E.g., Peterson v. Lampert*, 319 F.3d 1153, 1156 (9<sup>th</sup> Cir. 2003)(*en banc*); *Vang v. Nevada*, 329  
2    F.3d 1069, 1075 (9<sup>th</sup> Cir. 2003). In the state courts, the petitioner must refer to the specific  
3    federal constitutional guarantee and must also state the facts that entitle the petitioner to relief  
4    on the federal constitutional claim. *E.g., Shumway v. Payne*, 223 F.3d 983, 987 (9<sup>th</sup> Cir.  
5    2000). That is, fair presentation requires that the petitioner present the state courts with both  
6    the operative facts and the federal legal theory upon which the claim is based. *E.g., Castillo*  
7    *v. McFadden*, 399 F.3d 993, 999 (9<sup>th</sup> Cir. 2005). The exhaustion requirement insures that the  
8    state courts, as a matter of federal-state comity, will have the first opportunity to pass upon  
9    and correct alleged violations of federal constitutional guarantees. See, e.g., *Coleman v.*  
10    *Thompson*, 501 U.S. 722, 731, 111 S.Ct. 2546, 2554-55, 115 L.Ed.2d 640 (1991).

Under *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), a petition presenting both exhausted and unexhausted claims must be dismissed without prejudice unless the petitioner dismisses the unexhausted claims or seeks other appropriate relief.

## ***Discussion***

15 In Ground 2, petitioner alleges that he was denied rights to a fair trial, to due process  
16 and to confrontation under the Fifth, Sixth and Fourteenth Amendments due to prosecutorial  
17 misconduct in the State's closing argument.

18 Respondents contend, *inter alia*, that the claim in whole or in part is not exhausted.

19 As to lack of exhaustion, respondents contend: (a) that the corresponding claim  
20 presented in the state courts was presented only as a state law claim; and (b) further that no  
21 confrontation claim was presented in state court even if federal constitutional due process and  
22 fair trial claims, *arguendo*, otherwise were presented.

23 The Court is persuaded that petitioner fairly presented and exhausted federal  
24 constitutional due process and fair trial claims on direct appeal. Petitioner had not objected  
25 during closing argument at trial, so he thus had to rely upon a rule permitting appellate review  
26 for plain error based upon constitutional questions being raised. He argued that “[a]lthough  
27 defense counsel did not interpose an objection as to all of the improper remarks, the trial  
28 court had an obligation to intervene and protect Lopez-Benitez’ right to a fair trial under the

1 Sixth Amendment." He relied, during the course of his argument, upon, *inter alia*, *Williams*  
 2 *v. State*, 113 Nev. 1008, 945 P.2d 438 (1997), and *Witter v. State*, 112 Nev. 908, 921 P.2d  
 3 886 (1996), in support of his position that the trial court had a duty to intervene *sua sponte*  
 4 in the presence of obvious prosecutorial misconduct to protect the defendant's constitutional  
 5 rights. These cases, in turn, relied upon United States Supreme Court and/or Supreme Court  
 6 of Nevada precedent applying federal constitutional doctrine under the rights to a fair trial and  
 7 due process. See *Williams*, 113 Nev. at 1018, 945 P.2d at 444; *Witter*, 112 Nev. at 923, 921  
 8 P.2d at 897. The fair trial and due process claims thus are exhausted.<sup>1</sup>

9 The confrontation claim, however, is not exhausted. Petitioner points to argument in  
 10 a claim on state post-conviction review maintaining that the prosecutor's argument deprived  
 11 him of his right to confrontation in violation of the Sixth Amendment. This argument, however,  
 12 was presented in support of petitioner's claim that trial counsel provided ineffective assistance  
 13 in failing to object to the prosecutor's closing argument.<sup>2</sup> In order to exhaust a federal claim,  
 14 the petitioner must present *both* the same operative facts *and* the same legal theory to the  
 15 state courts that he does in federal court. *Castillo, supra*. Presenting a claim of ineffective  
 16 assistance of counsel based upon a failure to object to an alleged constitutional error does  
 17 not exhaust the underlying independent substantive claim of constitutional error. See, e.g.,  
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19 <sup>1</sup>See #22, Ex. 21, at 6-8.

20 The Court further would note that there does not appear to be a distinction of substance between a  
 21 constitutional right to a fair trial and a constitutional right to due process. The right to a fair trial is recognized  
 22 as a right guaranteed by the right to due process under the Fifth and Fourteenth Amendments. See, e.g.,  
 23 *Cone v. Bell*, 556 U.S. 449, \_\_\_, 129 S.Ct. 1769, 1772, 173 L.Ed.2d 701 (2009) ("The right to a fair trial,  
 24 guaranteed to state criminal defendants by the Due Process Clause of the Fourteenth Amendment, . . . .");  
*United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976) ("We are dealing with  
 25 the defendant's right to a fair trial mandated by the Due Process Clause of the Fifth Amendment to the  
 Constitution. Our construction of that Clause will apply equally to the comparable Clause in the Fourteenth  
 Amendment applicable to trials in state courts."); *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99  
 L.Ed. 942 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.").

26 The Court additionally notes that, while blanket references to "due process" and a "fair trial" detached  
 27 from any constitutional argument do not exhaust any federal constitutional claim, petitioner did more. At  
 some point, a defendant has to be able to actually exhaust a claim of deprivation of rights to due process and  
 to a fair trial. The very invocation of such phrases in asserting such a claim cannot negate its exhaustion.

28 <sup>2</sup>See #23, Ex. 52, at 13-14 & 19.

1       *Williams v. Stewart*, 441 F.3d 1030, 1041 (9<sup>th</sup> Cir. 2006); *Rose v. Palmateer*, 395 F.3d 1108,  
2 1111-12 (9<sup>th</sup> Cir. 2005); see also *Kimmelman v. Morrison*, 477 U.S. 365, 374 & n.1, 106 S.Ct.  
3 2574, 2582 n.1, 91 L.Ed.2d 305 (1986)(Sixth Amendment ineffective assistance claim for  
4 failure to raise Fourth Amendment claim distinct from underlying Fourth Amendment claim).

5           Ground 2 therefore is not exhausted to the extent that petitioner alleges that he was  
6 denied a right of confrontation under the Sixth Amendment.

7           IT THEREFORE IS ORDERED that the Court holds that the confrontation claim in  
8 Ground 2 (hereafter, the “unexhausted claim”) is not exhausted.

9           IT FURTHER IS ORDERED that petitioner shall have **twenty-one (21) days** from entry  
10 of this order to file a motion for dismissal without prejudice of the entire petition, for partial  
11 dismissal only of the unexhausted claim, and/or for other appropriate relief. This order directs  
12 the filing of a *motion*, not a notice or other filing.

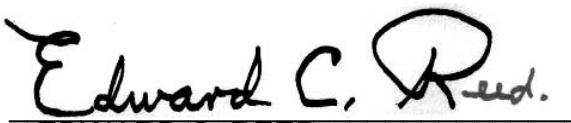
13           IT FURTHER IS ORDERED that any motion filed must contain or be accompanied by,  
14 either contemporaneously or via a document filed within **ten (10) days** thereafter, a signed  
15 declaration by petitioner under penalty of perjury pursuant to 28 U.S.C. § 1746 that he has  
16 conferred with his counsel in this matter regarding his options, that he has read the motion,  
17 and that he has authorized that the relief sought therein be requested from the Court.

18           IT FURTHER IS ORDERED that the opposition and reply times on the motion filed  
19 shall be the standard times provided for by the local rules, but with respondents’ opposition  
20 time running from service of the petitioner’s declaration rather than of the motion itself.

21           The entire petition, as amended, will be dismissed without prejudice for lack of  
22 complete exhaustion if a motion or the accompanying declaration is not timely filed.

23           **No extension of the deadlines established herein will be granted except in  
24 extraordinary circumstances.**

25           DATED: March 22, 2012.

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28           EDWARD C. REED  
United States District Judge